

ARTICLE 1904 BINATIONAL PANEL REVIEW
pursuant to the
NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF:

**Gray Portland Cement and Clinker from
Mexico; Final Review Determination (Fifth) of
Sales at Less Than Normal Value**

**Secretariat File No.
USA-97-1904-01**

February 10, 2000

**PANEL ORDER AFFIRMING
FINAL RESULTS OF REDETERMINATION PURSUANT TO PANEL REMAND**

Having received on November 15, 1999 the Final Results of Redetermination Pursuant to Panel Remand (ARedetermination on Remand@) of the *International Trade Administration*, Pub. Doc. No. 210,

Having received on December 9, 1999 comments by *the Southern Tier Cement Committee* concerning the Redetermination on Remand pursuant to Subrule 73(3)(a) of the Rules of Procedure for Article 1904 Binational Panel Review (APanel Rules@),

Having received on December 9, 1999 comments by *CEMEX, S.A. de C.V.* concerning the Redetermination on Remand,

Having received on December 23, 1999 comments by the *International Trade Administration* concerning the December 9, 1999 comments of the Southern Tier Cement Committee pursuant to Subrule 73(3)(b) of the Panel Rules,

Having received on December 29, 1999 comments by *Cementos de Chihuahua, S.A. de C.V.* concerning the December 9, 1999 comments of the Southern Tier Cement Committee pursuant to Subrule 73(3)(b) of the Panel Rules,

Having received on December 29, 1999 comments by *CEMEX, S.A. de C.V.* concerning the December 9, 1999 comments of the Southern Tier Cement Committee pursuant to Subrule 73(3)(b) of the Panel Rules,

Having considered the issues raised by the Redetermination on Remand and the comments of the parties, in the manner set out in the attached Analysis and Decision of the Panel,

And having concluded that the Redetermination on Remand should be affirmed, the Panel, pursuant to Subrules 73(6) and 77(c) of the Panel Rules, hereby ORDERS:

THAT the Redetermination on Remand be affirmed; and

THAT on the eleventh day hereafter the International Trade Administration shall publish a Notice of Final Panel Action.®

SIGNED IN THE ORIGINAL BY:

Robert E. Lutz, Chairman

February 10, 2000

Dr. Jorge Adame Goddard

February 10, 2000

Dr. Hector Cuadra y Moreno

February 10, 2000

Harry B. Endsley

February 10, 2000

Dr. Jorge A. Witker Velasquez

February 10, 2000

ANALYSIS AND DECISION OF THE PANEL

In its June 18, 1999 Opinion and Order of the Panel (“Opinion”), the Panel ordered the Department of Commerce (“Department”) to make determinations on remand consistent with the instructions and findings set forth in the Panel’s opinion. Among its instructions was the remand of the Department’s denial of a constructed export price (“CEP”) offset to CEMEX, S.A. de C.V. (“CEMEX”) and Cementos de Chihuahua, S.A. de C.V. (“CDC”) for a “detailed explanation of the questions raised by the Panel.”¹ On this issue, the Panel did not make a decision,² but instead asked the Department for clarification as to facts on the administrative record relevant to this issue, and as to certain aspects of the relevant law.

In its November 15, 1999 Final Results of Redetermination Pursuant to Panel Remand (“Redetermination on Remand”), the Department informed the Panel that it had reconsidered its original determination in the Final Results concerning this issue. In the Fifth Review Final Results,³ the Department had determined that, because all home-market and U.S. sales were made at the same level of trade, it was not appropriate to make any kind of adjustment to normal value for differences in levels of trade. In the course of preparing its clarifications for the Panel

¹Pub. Doc. 197, at 6.

²The Department, CEMEX and CDC, citing certain language in the Opinion, have asserted that the Panel has already decided the basic legal point at issue. Notwithstanding any suggestion to the contrary that might be given by this language, the Panel did not intend, and has not previously come, to a decision on this issue.

³Final Results, 62 Fed. Reg., at 17156.

on this issue, the Department decided to reconsider “the record evidence and the applicable legal standards”⁴ and, in the course of doing so, decided to “make an offset adjustment to normal value for certain sales comparisons, pursuant to 19 U.S.C. § 1677b(a)(7).”⁵ In particular, the Department stated: “[W]e have carefully reconsidered the level-of-trade information submitted by CEMEX and CDC in light of the applicable law. We have concluded that, with respect to those transactions involving constructed export price (‘CEP’), CEP offset adjustments to normal value are warranted.”⁶

Stating its conclusions with respect to CEMEX more fully, the Department stated: “Based on our analysis of CEMEX’s sales, we found that its home-market sales occurred at a more advanced stage of distribution than its CEP sales. Consequently, we could not match CEMEX’s CEP sales to its sales in the home market nor could we determine a level-of-trade adjustment based on CEMEX’s home-market sales of merchandise under review. Therefore, we have made a CEP-offset adjustment to normal value in accordance with the CEP-offset provision of the statute.”

Redetermination on Remand, at 19

Insofar as CDC was concerned, the Department stated:

“Based on our analysis of CDC’s sales, we found that CDC had two levels of trade in the United States – one for CEP sales and one for EP sales. We found that its home-market sales occurred at a single and more advanced stage of distribution than its EP and CEP sales. Because home-market sales were further advanced than either U.S. level of trade, we could not determine a level-of-trade adjustment. Therefore, we adjusted normal value using the CEP offset in CEP comparisons. Because there is only one level of trade in the home market, we could not make a level-of-trade adjustment to normal value in our analysis of CDC’s EP sales.”

⁴Redetermination on Remand, at 3.

⁵Id.

⁶Id., at 4-5.

Redetermination on Remand, at 19

The Department attached its Level-of-Trade Memorandum⁷ to further describe and support its analyses.

Southern Tier Cement Committee Remand Challenge

The December 9, 1999 comments of the *Southern Tier Cement Committee* (STCC) to the Redetermination on Remand (“STCC comments”) challenge the Department’s redetermination of this issue. STCC first notes that both CEMEX and CDC had originally “challenged Commerce’s determination [not] to grant them CEP offset adjustments.”⁸ In response, STCC had argued that this original determination was in fact proper because these parties had not shown that (1) the purchasers in the U.S. and home markets were at different stages in the chain of distribution, or that (2) the sellers in the U.S. and home markets performed different functions in selling to their customers.⁹ In the alternative, STCC had argued that if the Department’s original determination was not to be affirmed, the necessary remand by the Panel should require the Department to comply with the recent Court of International Trade decision in Borden, Inc. v. United States, 4 F. Supp. 2d 1221 (Ct. Int’l Trade 1998) (“Borden”), which had invalidated the CEP offset methodology employed by the Department in that case as well as in the instant

⁷Pub. Doc. 216.

⁸STCC Comments, at 4; word “not” omitted in the original.

⁹Id., at 4.

one.¹⁰

STCC is correct in noting that the Panel did not address this latter issue in its original Opinion and agrees with STCC that it is now incumbent upon the Panel to do so.¹¹

STCC describes the Department’s methodology for the level-of-trade of CEP sales in the following manner:¹²

Before determining the level of trade of each U.S. transaction, Commerce deducted all expenses referred to in section 1677a(d) from the starting price (the price paid by the unaffiliated U.S. purchaser). Commerce then identified levels of trade for these transactions using only the selling functions associated with the expenses that remained after the deductions. [Redetermination on Remand] at 13-14. With respect to home market transactions, however, Commerce defined the level of trade based on unadjusted transactions. Id.
(Emphasis in original)

STCC then notes that “[t]wo different judges of the Court of International Trade have recently held that this practice is contrary to law, because it is inconsistent with the plain language of the statute and leads to a virtually automatic CEP offset”, citing the Borden decision (Judge Restani) and the case of Micron Technology, Inc. v. United States, 40 F. Supp.2d 481 (Ct. Int’l Trade 1999) (Judge Goldberg) (“Micron”).¹³

Reciting its key language, STCC notes that the Borden court had held that “Commerce’s LOT [level of trade] comparison methodology in CEP cases does not comport reasonably with

¹⁰Id.

¹¹Id., at 4-5.

¹²Id., at 6.

¹³STCC concedes that both Borden and Micron are currently pending on appeal before the U.S. Court of Appeals for the Federal Circuit (“CAFC”), Appeals Nos. 99-1575 and 00-1058. Id., at 7, n. 5.

the current statutory scheme. The statute makes no mention of [section 1677a(d)] adjustments prior to the LOT analysis.... The statute instructs Commerce to compare based on differing levels of trade of sales in the United States and in the foreign market.”¹⁴ With attention to the principles set out in Chevron U.S.A., Inc. v. National Res. Defense Council, 467 U.S. 837, 842 (1984) (“Chevron”), STCC then cites the Borden court’s conclusion that “[t]he statute is not silent as to how Commerce is to contend with differences in the selling functions of these two types of sales.”¹⁵ In STCC’s view, therefore, the “plain language” of the statute requires that Department overturn its current methodology for considering a CEP offset, leaving no room for the Panel to consider the reasonableness of the Department’s interpretation of the statute pursuant to the second prong of Chevron.¹⁶

In addition, STCC argues that the Department’s level of trade methodology for CEP transactions is contrary to the legislative history set out in the Statement of Administrative Action (“SAA”). First, STCC cites language indicating that the level of trade analysis should take into account a difference in the “actual functions” performed by the sellers at the different levels of trade in the two markets,¹⁷ which suggests that “in identifying the level of trade of CEP sales, Commerce may not disregard any selling functions actually performed by the

¹⁴Borden, 4 F.Supp. 2d at 1241.

¹⁵Id.

¹⁶Id., at 6 (“[T]he Panel does not need to consider the second prong of the Chevron test, because Commerce’s approach to identifying the level of trade of CEP sales on remand contravenes the unambiguously expressed intent of Congress.”)

¹⁷H.R. Doc. 103-316, Vol. 1 (1994), at 829.

seller.”¹⁸ Second, STCC focuses on the language of the SAA indicating that section 773(a)(1)(B)(i) was intended to codify Commerce’s then “current practice” of calculating normal value at the same level of trade as the CEP or the starting price for the EP. Citing Certain Small Business Telephone Systems and Subassemblies Thereof from Taiwan, 57 Fed. Reg. 29,283 (1992), STCC notes that the Department’s existing practice at the time the Uruguay Round Agreements Act was enacted was to use *unadjusted* transactions as the basis for levels of trade.¹⁹

The Department’s Response

Responding to STCC’s challenges, the Department asserts that “Congress [has] unambiguously instructed the Department to use the constructed EP, rather than the U.S. starting price, in identifying the U.S. level of trade.”²⁰ The Department notes that Section 1677b(7)(B) requires that CEP offsets be granted in the following circumstances:

When normal value is established at a level of trade which constitutes a more advanced stage of distribution than *the level of trade of the constructed export price*, but the data available do not provide an appropriate basis to determine under subparagraph (A)(ii) a level of trade adjustment, normal value shall be reduced by the amount of direct selling expenses incurred in the country in which normal value is determined on sales of the foreign like product but not more than the amount of such expenses for which a deduction is made under section 1766a(d)(1)(D) of this title.

19 U.S.C. § 1677b(7)(B) (emphasis added)

¹⁸STCC Comments, at 9.

¹⁹Id., at 9.

²⁰Department Comments, at 4.

The Department then makes reference to the definition of “constructed export price” as it appears in Section 1677a(b) of the statute:

the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, *as adjusted under subsections (c) and (d) of this section.*

19 U.S.C. § 1677a(b) (emphasis added)

Based upon simple statutory analysis, the conclusion that must be drawn, therefore, is that “the ‘constructed export price’ for CEP offset purposes is not the CEP starting price, but the starting price *as adjusted* for certain enumerated expenses.”²¹

The Department goes on to observe that “the only difference between EP and constructed EP is that the latter is adjusted pursuant to subsection 1677a(d). The purpose of the subsection 1677a(d) adjustments is literally to ‘construct’ an export price from an observed price that may be said to ‘contain’ expenses incurred and profit earned in the United States.”²² Pointing to the

²¹Department Comments, at 5 (emphasis in original).

²²Id. The first statement by the Department may be illustrated by comparing the language of Section 1677a(a) and (b):

Sec.1677a(a) Export price

The term “export price” means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for the exportation to the United States, *as adjusted under subsection (c) of this section.*

(Emphasis added)

Sec. 1677a(b) Constructed export price

The term “constructed export price” means the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, *as adjusted under subsections (c) and (d) of this section.*

language of its new regulation, 19 CFR § 351.412, the Department observes that “the deduction under section 772(d) removes only expenses associated with economic activities in the United States. Thus, CEP is not a price exclusive of all selling expenses, because it contains the same type of selling expenses as a directly observed export price.”²³

The significance of these observations by the Department is the following:²⁴
[T]he Department’s practice of using the level of trade of the constructed EP in determining whether a CEP offset is warranted ensures an ‘apples-to-apples’ comparison between the level of trade of the EP or constructed EP, on the one hand, and the normal value level of trade, on the other hand. By using the constructed EP, the Department places all U.S. sales, whether classified EP or CEP, on par with directly observed normal value sales, which are presumed to ‘contain’ expenses similar to directly observed export price sales.

The Department also finds support for its methodology in language of the SAA not cited by STCC, which states that “new section 773(a)(1)(B) requires that Commerce, to the extent practicable, establish normal value based on home market (or third country) sales at *the same level of trade as the constructed export price or the starting price for the export price*.”²⁵

Finally, the Department informs the Panel that it has not acquiesced in the Borden and

(Emphasis added)

²³Department Comments, at 6, citing preamble to 19 CFR Part 351, 62 Fed. Reg. 27296, 278371 (May 19, 1997).

²⁴Department Comments, at 6.

²⁵Id., at 7, citing SAA at 829 (emphasis added).

Micron decisions,²⁶ and that the Panel is “free to affirm an agency interpretation of a statutory interpretation even where the U.S. Court of International Trade has reached a contradictory conclusion.”²⁷

CEMEX’s Response

Based upon the same statutory analysis as that of the Department, CEMEX also rejects the position taken by STCC—that the Department should identify the CEP level of trade without the adjustments to U.S. price required by 19 U.S.C. § 1677a(d)—and argues that “the Department correctly adjusted the price for the indirect selling expenses incurred in the United States that support the sale to the unaffiliated purchaser.”²⁸ CEMEX also notes that the Department’s analysis is consistent with Article 2.4 of the WTO Antidumping Agreement, which provides:

[A]llowances for costs, including duties and taxes, incurred between importation and resale, and for profits, accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph.

With respect to the Borden and Micron decisions, CEMEX also notes that they are “not final” and that the Department has appealed those determinations to the Court of Appeals of the Federal Circuit (“CAFC”).²⁹ Beyond that, CEMEX believes that the legal reasoning and

²⁶Department Comments, at 7.

²⁷Id., at 8.

²⁸CEMEX Comments, at 4.

²⁹Id., at 5.

statutory analysis set out in those cases “is faulty.”³⁰ In particular, CEMEX suggests that the Borden court looked at the CEP offset provision “in a vacuum,” found no specific adjustment provision therein, and therefore concluded the Department’s methodology was incorrect. In CEMEX’s view, however, one must examine the “entire statutory scheme”³¹ and apply the normal rule of statutory construction that identical words used in different parts of the same statute are intended to have the same meaning.³² On these bases, it would be appropriate to conclude that³³

the meaning of CEP, as used in the level of trade and CEP offset provisions set forth in 19 U.S.C. 1677b(a)(7)(A) and (B) must necessarily correspond to the statutory definition of CEP as set forth in 19 U.S.C. [§] 1677a(b). The former statutory provision mandates that the level of trade analysis be based upon constructed export price. The latter statute defines CEP as an adjusted price. Thus, when the statute is read as a whole, the Department’s identification of the CEP level of trade on the basis of an adjusted CEP comports with the statutory directive.

CEMEX also argues that the Borden court misconstrued the reference to “sales” in the level of trade provisions, as necessarily referring only to the starting price of the U.S. sale. In CEP situations, however, sales are made at two locations along the distribution chain, one between the producer and the affiliated importer and a second between the affiliated importer and the unaffiliated U.S. customer. Thus, it was reasonable for the Department to interpret the term

³⁰Id., at 6.

³¹Id., citing K-mart Corp. v. Cartier, 486 U.S. 281, 291-292 (1988) (look to the particular statutory language in the context of the statute as a whole).

³²Id., citing Sullivan v. Stroop, 496 U.S. 478, 484 (1990)

³³Id., at 7.

to indicate the sale between the producer and the affiliated importer.³⁴

Thirdly, CEMEX points to the concern expressed in the Borden decision that the application of the Department's level-of-trade and CEP offset methodology would result in an "automatic" CEP offset adjustment in CEP situations. CEMEX cites a number of administrative determinations wherein the Department has found that a CEP offset was not warranted, despite the application of its normal methodology.³⁵

Finally, CEMEX also disputes the Borden court's assumption that its preferred (or an alternative) methodology would result in fairer comparisons, reiterating the argument made by the Department on this point.³⁶

CDC's Response

For its part, CDC also argues that the Department's decision on remand to grant CDC a CEP offset was correct and in accordance with the statute. Paralleling arguments already noted above, CDC argues that:³⁷

In defining the level of trade for CEP sales under the statute, the Department will consider only those selling functions reflected in the price after the deduction of all expenses provided for under Section 772(d). These are the selling expenses associated with selling functions in the United States, such as those performed by an exporter's U.S. subsidiary. The Department's practice and new regulations

³⁴Id.

³⁵See Collated Roofing Nails from Korea, 62 Fed. Reg. 51420, 51420 (1997); Certain Welded Carbon Standard Steel Pipes and Tubes from India, 62 Fed. Reg. 47632, 47640; and Porcelain-on-Steel Cookware from Mexico, 62 Fed. Reg. 42496, 42503.

³⁶Id., at 8.

³⁷CDC Comments, at 5.

reflect this approach. Therefore, once the selling expenses associated with selling functions in the United States are taken out of the CEP, it is no longer possible to base the CEP level of trade on ‘actual’ rather than ‘adjusted’ transactions as the Petitioner suggests.

CDC also references the fact that the Borden and Micron decisions are not binding while on appeal.³⁸

Decision of the Panel

The Panel has carefully considered the arguments of the parties and reviewed the Borden and Micron decisions in detail. Considering that the Borden court wrote at length on this issue, following special briefing addressed solely to this issue,³⁹ its analysis is entitled to the greatest respect.

The Borden court began its analysis by quoting the relevant statutes, particularly the level-of-trade and CEP offset statutes, and summarized in some detail the precise methodology used by the Department in making these two adjustments.⁴⁰ After considering the argument of Borden that the Department’s methodology—comparing an *adjusted* CEP with an *unadjusted* normal value—was unfair and skewed, the Borden court stated as follows:⁴¹

First, the court determines whether the statute is silent or ambiguous [citing Chevron]. If the statute is clear, the court does not defer to the agency’s interpretation; only if the statute is silent or not clear as to the issue at bar does the court proceed to the second step and ask if the agency’s interpretation is

³⁸Id., at 6.

³⁹Borden, 4 F.Supp.2d., at 1234, n. 11.

⁴⁰Id., at 1237.

⁴¹Borden, 4 F.Supp.2d, at 1240. In note 28, the court stated that “the pre-adjustment itself creates the automatic CEP offset....”

reasonable.... The court does not find statutory silence or ambiguity as to the fundamental matters at issue in this case.

Whatever are Commerce’s concerns about a balanced final price comparison, Congress has defined how this particular adjustment will be made. The statute clearly provides for a *conditional* level of trade adjustment, instructing Commerce to make the adjustment to normal value if various conditions obtains. 19 U.S.C. § 1677b(a)(7). By contrast, the methodology employed by Commerce amounts to an unconditional adjustment in every CEP case.

(Emphasis in original)

Elsewhere in the opinion, the Borden court reiterated its view that the statute makes no mention of “(d)” type adjustments prior to the level-of-trade analysis; it instead instructs the Department to make its comparisons based on “differing levels of trade of sales in the United States and in the foreign market,” and that the Department had in effect substituted an *automatic* adjustment for what Congress intended to be a *conditional* adjustment.⁴²

With respect, the Panel does not concur with the Borden court’s analysis. Considering the statute as a whole and the CEP offset provision in particular, the Panel does not find that the latter provision is so patently clear that the methodology preferred or suggested by the Borden court is the only one possible, or that the methodology currently being employed by the Department is in obvious or manifest disregard of that statute.

The Panel simply does not find the “plain meaning” in the statute that the Borden court appears to find.⁴³ Indeed, the Panel finds that the Department’s reading of the statute, taken as

⁴²Id., at 1241.

⁴³As noted above, the Borden court appears to view the CEP offset provision, 19 U.S.C. § 1677b(7)(B), somewhat in isolation. In certain situations, that approach may, indeed, be appropriate, but the Panel finds it unusual to employ that analysis to exclude a definitional provision set out in the same larger statute. Congress has used a specially defined term—constructed export price—in the CEP offset provision, and it can hardly be unacceptable or unreasonable for the Department to interpret the CEP offset provision in the light of that definition. The Panel is aware of no rule of statutory construction that would support such an approach and, indeed, as noted by the parties, the rule of statutory construction that appears to be applicable is definitely to the contrary.

a whole, is the more compelling and straight-forward reading. Nevertheless, the Panel is willing to say, in this very complex area of the law, that the statute is “ambiguous” for purposes of the Chevron analysis and that the appropriate test for the Panel is whether the Department’s reading of the statute is a reasonable one, to which the Panel should defer. We believe that it is, and we thus defer.⁴⁴

⁴⁴Relatedly, the Panel is also concerned with the “automaticity” argument of the Borden court, as evidenced by its language that the “pre-adjustment itself creates the automatic CEP offset....” Borden, 4 F.Supp..2d, at 1240, n. 28. The language of the Borden opinion strongly suggests that the court was quite concerned that the Department’s methodology had turned Congressional intent on its head, converting a *conditional* adjustment to an *automatic* one. The Panel notes that CEMEX has cited administrative decisions which, if accurately construed, would tend to allay some of those concerns. See n. 35 *supra*. Moreover, Chapter 19 panels are particularly ill-equipped—some might even say, completely unauthorized—to ponder the issue of how much automaticity is acceptable under a statute and how much isn’t. It would appear to the Panel that the correct forum for that analysis must always be Congress itself, and not the Panel, which generally must let the cement blocks fall where they may.